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June 6, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: December 5, 2007

Case Number: TSO-0604

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ For the reasons set forth below, I conclude that the individual should not be granted a security clearance at this time.

I. BACKGROUND

The individual is employed by a Department of Energy contractor, who requested a security clearance on his behalf. As part of the clearance process, the individual filled out and submitted a "Questionnaire for National Security Positions" (QNSP) on February 17, 2006. The Office of Personnel Management (OPM) performed a background investigation, and the individual was summoned for a Personnel Security Interview (PSI) with a security specialist in October 2007. After reviewing the individual's personnel security file, including the QNSP, the OPM Report of Investigation and the PSI transcript, the local security office determined that derogatory information existed that called into question the individual's eligibility for a security clearance. They informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The local security office forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer. At the hearing, the individual introduced four exhibits into the record and presented the testimony of eight witnesses, in addition to his own. The DOE introduced seven exhibits into the record.

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

II. THE NOTIFICATION LETTER

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (f) and (k) of the criteria for eligibility for access to classified matter or special nuclear material, set forth at 10 C.F.R. § 710.8.

Paragraph (f) defines as derogatory information indicating that the individual "has deliberately misrepresented, falsified, or omitted significant information from . . . a Questionnaire for Sensitive (or National Security) Positions, a Personnel Security Interview [or] written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization" With regard to this paragraph, the Letter states the individual failed to report a 2004 DUI arrest and a 2004 usage of cocaine on his QNSP, and that he made false or misleading statements to the OPM investigator about his cocaine usage and about an incident during his time in college in which he was found to have been in possession of alcohol in an alcohol-free dormitory.

Under paragraph (k), information is derogatory if it indicates that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.)" except as prescribed or administered by a physician or otherwise authorized by federal law. Specifically, the Letter cites the individual's 2004 usage of cocaine.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and

cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. Findings of Fact and Analysis

A. Derogatory Information and the Associated Security Concerns

The following information is not in dispute. On February 17, 2006, the individual submitted a QNSP to the DOE. Question 23(d) of the QNSP asks "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" The individual responded "No." DOE Exhibit 4. However, the individual was charged with Driving Under the Influence of Alcohol (DUI) in July 2004. He was stopped for speeding after drinking three beers over a two-hour period at a bar with some friends. His blood alcohol content was measured at .09. He later pled guilty to DUI, paid a fine, and had his license suspended for six months. DOE Exhibit 3 (PSI) at 55-58.

On that same QNSP, the individual answered "Yes" to question 24(a), which asks whether the applicant has used illegal drugs "since the age of 16 or in the last 7 years, whichever is shorter." The question then requires the applicant to list each usage. On his QNSP, the individual listed three usages of marijuana from July through December 1997. DOE Exhibit 4. However, he intentionally omitted a usage of cocaine that occurred in 2004 while he was a member of the National Guard. Subsequent to this usage, he was administered a drug test by the National Guard, and he tested positive for cocaine.

The individual also admitted lying about his usage of, and positive test for, cocaine to the OPM investigator. PSI at 11-14. Furthermore, he told the OPM investigator that he had no questionable conduct or disciplinary actions while in college, but during the PSI, the individual admitted that he had been found in possession of alcohol while in an alcohol-free dormitory. PSI at 17-18.

These circumstances adequately justify the DOE's invocation of paragraphs (f) and (k), and they raise significant security concerns. Conduct such as that described above, which involves lack of candor or dishonesty, can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Furthermore, use of an illegal drug can also raise questions about an individual's reliability and trustworthiness, both because such usage may impair judgement and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and H.*

B. Mitigating Information

At the hearing, the individual attempted to show, through the testimony of his supervisor, two co-workers, four friends, his step-father, and his own testimony, that the incidents described in the Notification Letter are aberrations, and that he is an honest and reliable person who should be entrusted with a security clearance. All of the individual's witnesses testified as to his character, and their testimony was essentially consistent in all important respects, *i.e.*, that the individual is an

honest and trustworthy person who does not use illegal drugs. The individual's friends and co-workers all testified that the individual is a physical fitness enthusiast, and that illegal drug use would be inconsistent with this lifestyle. Hearing Transcript (Tr.) at 27, 42, 52, 69, 89. The individual's step-father testified that he is a Licensed Alcohol and Drug Abuse Counselor, and that the individual's use of marijuana as a teenager and cocaine in 2004 were isolated incidents that are unlikely to be repeated. Tr. at 101-104, 108-110.

The individual testified that he provided false or incomplete information on the QNSP and lied to the OPM investigator because he believed that if he told the truth, he would not be hired. Tr. at 128, 157. He further indicated that he talked with his mother and with a friend, who is a police officer, about whether he should reveal the DUI arrest on his QNSP, and "collectively we came to a conclusion" that he should not do so. Tr. at 137. He told the truth during the PSI, however, because he had a greater appreciation of "the level of seriousness of a Q clearance," Tr. at 149, and because he had come to believe that his "best bet [was] to just be truthful about anything" that could be considered derogatory. Tr. at 150. Regarding his failure to inform the OPM Investigator about the incident during which he possessed alcohol in an alcohol-free dormitory, he characterized the occurrence as "insignificant," and explained that he "simply had forgotten about it." Tr. at 158.

The individual also testified about his illegal drug usage. He stated that, while in high school, he began associating with people who used marijuana, and that he used the drug on several occasions in 1997 as the result of peer pressure. He was 15 or 16 years old at the time. Tr. at 160-161. His 2004 cocaine usage happened at a party that was being held in a college dormitory suite that the individual shared with four other roommates. He explained that he used the drug in an attempt to "fit in" with the other students. Tr. at 161-162. He further indicated that these were his only usages of illegal drugs, and that he did not intend to use them again. Tr. at 164.

C. Analysis

After reviewing this testimony and the entirety of the record in this matter, I conclude that the individual has adequately addressed the DOE's security concerns under paragraph (k), but that the DOE's concerns under paragraph (f) remain unresolved.

With regard to paragraph (k), several mitigating factors exist that lead me to conclude that the chances of future illegal drug use by the individual are negligible. First, the testimony of the individual's witnesses, and the record as a whole, indicate that individual used illegal drugs very infrequently, and not at all since his single cocaine usage four years ago. PSI at 27-39, Tr. at 21, 27, 42, 52, 69, 88. Second, there is no indication in the record that the individual has ever been diagnosed with a substance use disorder. Finally, his devotion to physical fitness suggests that he has adopted a lifestyle that is inconsistent with the continued use of marijuana or cocaine. Given these factors, I found credible the individual's testimony that he does not intend to use illegal drugs in the future. I find that no substantial security concerns presently exist regarding the individual's illegal drug usage. *See, e.g., Personnel Security Hearing*, Case No. TSO-0192 (November 9, 2006) (limited usage and two years' abstinence sufficient to address security concerns); *Personnel Security Hearing*, Case No. TSO-0103 (September 14, 2004) (limited usage and two-and-one-half years' abstinence adequate to address security concerns).

I reach a different conclusion regarding the DOE's security concerns under paragraph (f). In a number of Decisions, Hearing Officers have considered the implications of intentionally providing false or incomplete information. The factors considered in these cases include the following: whether the individual came forward voluntarily to admit his falsifications, *compare Personnel Security Hearing*, Case No. VSO-0037 (November 20, 1995) (voluntary disclosure by the individual) *with Personnel Security Hearing*, Case No. VSO-0327 (April 20, 2000) (falsification discovered by DOE Security); the length of time the falsehood was maintained; whether there was a single incident, or whether a pattern of falsification or omission is evident; and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing*, Case No. VSO-0327 (April 20, 2000) (less than a year of truthfulness insufficient to overcome a long history of falsification). *See also Personnel Security Hearing*, Case No. TSO-0175 (July 22, 2005) (15 months since falsification corrected insufficient evidence of reformation); *Personnel Security Hearing*, Case No. VSO-0319 (June 14, 2000).

In this case, the individual has admitted to multiple falsifications and omissions that occurred during the course of two separate events: the February 2006 QNSP and the August 17, 2006, interview with the OPM investigator. Moreover, as of the date of the hearing, less than seven months had elapsed since the individual ended over a year-and-a-half of deception by admitting his falsifications and omissions during the November 2007 PSI. Even then, his admissions came only after being confronted during the PSI with the information he had failed to disclose earlier. PSI at 7, 11, 15. Had it not been for this interview, there is no indication in the record that the individual would have come forward with the information of his own volition.

I have considered the individual's outstanding reputation for honesty and reliability among his friends and co-workers, and his honest and candid testimony at the hearing. However, I find these factors to be outweighed by the circumstances set forth above. The DOE's security concerns under paragraph (f) remain unresolved.

V. CONCLUSION

I therefore find that the individual has failed to adequately address the DOE's security concerns under paragraph (f), and I conclude that he has not demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual should not be granted a security clearance at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: June 6, 2008